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No. 22

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TIME, INC.,

Appellant,

against

JAMES J. HILL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE.

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April 13, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 562.

TIME, INC.,

Appellant,

against

JAMES J. HILL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE.

Opinions Below.

The memorandum opinion of the New York Court of Appeals and the dissenting opinion are reported at 15 N. Y. 2d 986, 207 N. E. 2d 604 (1965) and appear in the Transcript of Record at 453-56. The majority and concurring opinions of the Appellate Division, which were adopted by the Court of Appeals, and the dissenting opinion, are reported at 18 App. Div. 2d 485, 240 N. Y. S. 2d 286 (1st Dept. 1963), and appear in the Transcript of Record at 435-44.

Question Presented.

Did the judgment below abridge the freedom of the press by awarding damages under the New York privacy statute to an individual who was injured by the use of his name without consent as the primary subject of a magazine

article which was fictionalized for advertising purposes and for the purposes of trade?

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved are set forth in the Appendix *infra*, pp. 47-49.

Statement.

Appellant urges that this appeal presents a "collision" between the right of privacy and freedom of the press (p. 39 of Brief for Appellant, hereinafter called "Brief"). The premise of this argument is that the LIFE article was a news report which merely contained incidental and inadvertent inaccuracies and is entitled to constitutional protection (Brief 2, 10, 18, 25, 32). We submit, however, that the judgment appealed from is based upon a fundamentally different state of facts. The courts below found that the statements in the LIFE article relating to appellee were primary to the article and intentionally fictionalized appellee's experience to serve the commercial purposes of appellant.

Like a composite photograph, the LIFE article of February 28, 1955 took the actual experience of appellee's family in September, 1952 and the fictional experience of a fictional family in the novel and play The Desperate Hours, and, by mixing news clippings, staged photographs, and text, created an apparent relationship between the two experiences that was false. Appellee's experience was notable for the absence of violence and the unusual politeness of the convicts (*e.g.*, R. 25-26, 33, Ex. 1, at R. 321-22). In contrast, The Desperate Hours was a melodrama of violence and brutality. The atmosphere of The Desperate

Hours is captured in the fictional father's reflection that the convicts had put his family "through two days of nightmarish hell; they had beaten and threatened and terrified; they had brought violence and the smell of blood and filth into his home" (Ex. 12, p. 204).

When appellant, in January and February, 1955, photographed actors from The Desperate Hours in appellee's former home, and then published a carefully edited article that told the American public that The Desperate Hours was a re-enactment of appellee's 1952 experience, it was not publishing news but was perpetrating a hoax on its readers at the expense of appellee and his family.

1. *The Hill Experience.* On September 11-12, 1952, appellee, his wife, and their five children, were held captive in their home for 19 hours by escaped convicts. In contrast to other such incidents that periodically appear in the news, the experience was distinguished by a total absence of violence or abuse. The convicts showed no anger toward any member of the family, did not touch any of them, and, save for the general restraint, treated the Hills decently and politely. Mr. Hill made clear after the incident that he had not tried to be a "hero." He counseled his family to be completely submissive, and the family followed out every command from the fugitives—even to the extent of waiting five hours after their departure to call the police (R. 28-29).*

2. *The Desperate Hours.* The novel, and the play and motion picture based thereon, tell the story of a three-day reign of terror by three escaped convicts who invade a home

---

* The politeness of the convicts and the submissiveness of the Hills was made clear by all contemporaneous news accounts (Exs. 1, 5A, B, R. 321-22, 325, 380-81). These factors provided the theme of a light account carried by appellant's *Time* magazine for September 22, 1952, entitled "House Party" (Ex. 2, R. 323-24).

in suburban Indianapolis and hold the family hostage while the leader of the convicts attempts to execute a complex scheme to murder a local sheriff against whom he has a grudge. Standard elements of pulp fiction—the brutality of sadistic criminals, the terror of ordinary persons held in bondage outside the law, sordid sexual implications, sudden eruptions of violence, a family rising to heroism—all are skillfully combined to give The Desperate Hours its dramatic force. The *New York Times* book review, "Nightmare at The Hilliards," observed that the "story-line is a familiar one (what happens when a trio of mad-dog convicts hole up in an average home after a jail break)," but that Hayes had "milked the last drop of horror from his macabre situation" (R. 327).*

In conventional crime fiction style, the tone of the story is set at the outset by the gangleader's warning to the

---

* The *N. Y. Times* review continued:

> "So, inevitably are most plot patterns in novels of this genre: it is the treatment, not the ingredients, that really matters" (R. 327).

A similar view of the novel and play runs through the reviews, *e.g.*:

> "His central situation is an old one and has been used many times before in novels, plays and movies." Prescott, *Books of The Times* (R. 332).
>
> "Joseph Hayes has made a lightning-paced thriller out of his novel about an ordinary household invaded by killers, and while the material isn't exactly new—a couple of films, 'He Ran All The Way' and 'Suddenly', come to mind—the author has worked out a dozen or so breath-taking twists on it." Kerr, *N. Y. Herald Tribune* play review (R. 212).
>
> "Not since mobsters Ross Hertz, Tom Fadden and Humphrey Bogart held as prisoners Leslie Howard and all the other innocent people they found in a lunchroom in 'The Petrified Forest' has there been as ruthless an invasion as there is in Joseph Hayes' play 'The Desperate Hours'." Chapman, *N. Y. Daily News* play review. *Ibid.*
>
> "[A] variation on a classic thriller theme." Hawkins, *N. Y. World Telegram and Sun* play review. *Ibid.*

mother when he enters the house: "Take it easy, lady. . . . You scream, the kid owns that bike out there'll come home an' find you in a pool of blood" (Ex. 15, p. 27). From start to end, the convicts have contempt for the family and their home (*id.* 31-32, 40-41, 100, 170). The convict tells Dan Hilliard he reminds him of his own "little punk" of a father (*id.* 44). The family is cursed and abused (*id.* 29, 40, 44, 46, 81-82, 150-51, 168, 176). The father is beaten into unconsciousness (*id.* 81-82); the son is viciously manhandled (*id.* 46, 80, 171); the mother is pushed to hysteria (*id.* 99, 148-50). The daughter is considered the sexual prey of the convicts (*id.* 47-48, 67, 74-76, 130). Robish, the dull, brutish convict, drunkenly attempts to paw the daughter, with the command: "Lift your arms, baby. I'm gonna search you personal" (*id.* 74). The mother and son are to be taken away by the convicts as hostages (*id.* 170). The family fights back. The son tries to get a message out to the police (*id.* 80, 118, 132); the daughter clashes with the convicts, biting the wrist of one of them to get his gun away (*id.* 78); the father meets violence with violence (*id.* 46, 171).

A central theme of the novel and play is the degradation of the father and daughter by their subjection to the will of the convicts. They are forced to leave the house to help the convicts with their criminal plans to the extent of being virtual accessories to murder (*id.* 147-52, 162). As his family is cursed, his son beaten (once by himself at the orders of the convicts), his daughter pawed, his home turned into a shambles of filth and horror, the father is himself driven to the point of almost committing murder (*id.* 176-77). A final act of great heroism and daring by the father saves the family (*id.* 165, 169, 171, 175-76). In a state of shock and under the delusion that he and his brother are once again teenagers defying their hated

father, the gangleader runs from the house, brandishing an empty gun, and is shot down on the front porch by a deputy sheriff (*id.* 178). As the play ends, the members of the family return, one by one, to the "havoc" that was their home (*id.* 9, 179).*

Obviously, as author Hayes testified, The Desperate Hours was not the story or a re-enactment of the Hills' experience, in whole or in part (R. 99-100, 124). The principal elements of The Desperate Hours, and the elements which made it a sensational and commercially successful

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* None of the above are shown or even suggested by what appellant describes as its "comparison" of The Desperate Hours and the Hill experience (Brief 5-7, 27). The basic approach of the "comparison" is to omit the central events of The Desperate Hours, since they had no counterpart in the Hill experience. By way of illustration, since none of the events in The Desperate Hours photographed for the LIFE article (the three "crises" at the back door, the activities of the "Brutish Convict," "Daring Daughter," and "Feverish Father") occurred in the Hill experience, none are mentioned in appellant's comparison.

Beyond this, the effort is to create an impression of similarity by a variety of editorial devices. The main technique is the use of parallel phrases, even when describing differences. Trivial physical details, common to most jailbreaks and hostage incidents (police activity, theft of clothing, "convicts arrive," listening to the radio, etc.) are assembled and listed. Inconsequential details are misstated, *e.g.*, the "Season" was not "Early fall" in either the play or the Hill experience; the Hills had two teenage daughters, whereas the comparison indicates only one; and in the Hill incident, the convict brothers were not killed during "The Convicts' Escape from the Home," but were killed two weeks later in New York City. Similar inaccuracies and language devices (parallel phrases, omission of key words, switching from one source to another) were used by appellant and commented on by appellee below (R. 551-53). But the crucial consideration is that the heart of The Desperate Hours is omitted from the three-page tabular study. It is not a "comparison," nor is it even a legitimate aid to argument.

Appellant's references to the original pleadings and to an excerpt from Mrs. Hill's testimony (Brief 12), are also incomplete and misleading. Contrary to the inference which appellant seeks to convey, the pleadings alleged that The Desperate Hours fictionalized appellee's experience (R. 339), and Mrs. Hill testified that The Desperate Hours "had no reference to what occurred to [her] in Whitemarsh in 1952" (R. 287).

melodrama, are violence, sex and heroism. These are precisely the elements which were wholly absent from the Hills' experience. The Hills' calm acceptance of their difficult situation and the civility of the convicts were the very antithesis of the drama which Hayes created and which became The Desperate Hours.

3. *Background of The Desperate Hours.* Joseph Hayes became interested in the dramatic possibilities of the hostage theme in 1946 when he wrote a short story based thereon for *The Woman's Home Companion* (R. 35). Between 1946 and 1953, he noted and collected newspaper and magazine articles reporting cases of persons and families held captive by criminals (R. 86-88, 99-100, 138-39).* During that period, Hayes lived in a suburban home with his wife and two children within sight of the federal penitentiary at Danbury, Connecticut (R. 143-44). He testified that The Desperate Hours was shaped out of these multiple and diverse elements—"The classic hostage theme, the many news and magazine accounts of homes . . . and families held prisoner by convicts and criminals," and his own personal location near a penitentiary (R. 90-91).

4. *The Preparation of the* LIFE *Article.* The Desperate Hours was published as a novel in 1954, and adapted for

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* Among these were a California case where three convicts held a man, his wife and two children prisoner and made the husband go into town to perform an assignment for them (R. 88); a case in Ohio where three escaped convicts held a family captive and ultimately shot them (R. 89); an episode in Kansas where two criminal brothers called Bistrom held a family captive (R. 156). In 1951, Hayes noted a report about two brothers named Battershaw and a third criminal who held a family captive in Omaha (R. 156). In 1952, appellee's experience similarly involving three convicts, two of whom were brothers, came to Hayes' attention (R. 99). Another incident that Hayes knew about when he wrote his novel took place after appellee's incident and involved the Lerby family in Pennsylvania, who were imprisoned in their home by five escaped convicts (R. 99, 157).

stage and screen in that same year (R. 81). Release of the film was deferred until the run of the play was completed (Ex. A, R. 15). In the fall of 1954, the play went into production with pre-Broadway tryouts scheduled in New Haven and Philadelphia (R. 106). Coverage by LIFE was considered "very important" publicity for the new play (R. 103). At a luncheon in December, 1954, tendered by a group of LIFE editors to Robert Montgomery, the director and a financial backer of The Desperate Hours, Montgomery mentioned the pending production, and said it should be covered by LIFE (R. 169-71). Subsequently, LIFE's Entertainment Editor, Tom Prideaux, went to Montgomery's office and discussed with him interesting photographic approaches to coverage of the play (R. 172-73).

Prideaux testified that some time during this period, he heard that an actual incident involving a family imprisoned by convicts had taken place near Philadelphia (R. 174-76). When he later read that The Desperate Hours was trying out in Philadelphia, he decided to investigate the possibility of "real-life" coverage of the play (R. 176). He first called the press agents for the play and asked them what they knew about the incident; they told him they knew nothing about it (R. 177). When he later called author Hayes in Philadelphia, however, he did not ask Hayes about the extent of the relationship, or if there was one, between the incident and the play (177-78). Rather, he testified that he "assumed" there was some relationship, and simply asked Hayes to determine whether the house where the Philadelphia incident had occurred was available for photographic work (R. 179-82).

Hayes testified that beyond confirming to Prideaux that "an incident" involving the imprisonment of a family by convicts had taken place near Philadelphia, he never discussed the relationship of appellee's experience to The Desperate Hours, and was never questioned about it by any

representative of appellant (R. 124, 144-45). Hayes further testified he had no thought that LIFE would use the Philadelphia incident in anything more than an illustrative fashion (R. 116-17); and did not even remember the name of the Philadelphia family when Prideaux called him (R. 108).

Shortly after this telephone call, Prideaux went to Philadelphia on January 17, 1955, visited appellee's former home, and conferred with Hayes at length, but never once mentioned the "assumed" relationship between appellee's incident and The Desperate Hours (R. 182-85). Prideaux testified that neither then nor at any other time did he ask author Hayes what, if any, relationship there was between the two (R. 184, 201, 203-04).

That evening, accompanied by Miss Laura Ecker (later Mrs. Laura Ludwig), one of appellee's researchers, Prideaux went to the theatre in Philadelphia and, for the first time, saw The Desperate Hours (R. 185).

After seeing the play and conferring with Hayes, Prideaux returned to New York and submittted a story memorandum to the Photo Editor of LIFE (R. 186). On the basis of the memorandum, permission was granted to proceed with photographic work.* Location photography at appellee's former home and in the Philadelphia theater took place on January 31 and February 1, 1955, under the aegis of Miss Virginia Shevlin (later Mrs. Virginia Addison), another of appellant's researchers, whose understanding as to the reason for the use of appellee's former home was minimal (R. 161-64). She was "just told [by Prideaux] that there was a similarity, it would be a good, as I said before, gimmick and would add to the interest of the story, rather than straight picture coverage, as Miss Ecker told you" (R. 164). In accordance with LIFE's standard procedure for such publicity articles, the theatrical costs of the

* This memorandum was no longer in existence when Prideaux was examined in 1957 (R. 169).

photographic work were paid by the producers of the play (R. 117-18, 186). Additional photographic work was done in New York thereafter (R. 118).

When the photographs were developed, Prideaux prepared and presented a photo-layout of the proposed article —without text—to the Managing Editor of LIFE, Edward K. Thompson, explained the story idea to him, and obtained approval to go forward (R. 186-88). Among other things, he purportedly told Thompson there was a connection between the play and the incident and the plan was to "draw this connection by certain devices in the layout"—*i.e.*, the house, a headline from a Philadelphia newspaper, and the text (R. 187-88).

In mid-February, 1955, when Prideaux sat down to draft the text of the proposed article, he testified that he had before him, and read, the news clippings of the 1952 Hill incident and the contents of a small envelope called the "story file," which consisted of several reviews of The Desperate Hours and an article by author Hayes describing how he wrote it, which appeared in *The New York Times* of January 30, 1955 (R. 196-98).

The contemporaneous news accounts of appellee's experience revealed its singularly non-violent quality. For example, the Associated Press story in *The New York Times* for September 13, 1952, reported appellee's statement that he had complied with the convicts' instructions and that none of the family had been harmed; it quoted Mrs. Hill's statement that the fugitives behaved like "perfect gentlemen" and "even apologized for interrupting a conversation" (Ex. B, R. 380-81).*

---

* *The Times Herald* of Norristown, Pa. for September 12, 1952 ran a special front-page story headlined (Ex. 1, R. 321):

"'Pardon Me'"

"CONVICTS POLITE TO CAPTIVE FAMILY"

"Desperadoes Cooperative and Offer to Aid Couple And Five Children."

Hayes' *New York Times* article, datelined Philadelphia and published the day before LIFE's personnel started photographic work in Philadelphia (Ex. G, R. 382-85), exposed as sheer fantasy any notion that The Desperate Hours was a re-enactment of appellee's experience. In this article, Hayes described the writing of The Desperate Hours in these terms:

> "The novel and the play version of it—was based on various news stories. In California, in New York State, in Detroit, in Philadelphia, frightened and dangerous men entered houses, held families captive in their own homes; these were headline stories, soon forgotten. Some ended tragically, others did not. The newspapers soon dropped all reference to them. . . ."
>
> "Instead of researching any of the specific 'cases', however, I found it best to let my imagination play with the idea. . . ."
>
> ". . . Curiously enough, I discovered as I wrote that the principal theme came into focus: the life-and-death struggle between a typical, law-abiding man, with no knowledge of his own inner resources or of the precious quality of his way of life, and the twisted, jungle-like mind of a young criminal, himself a human being and a victim. It became more and more interesting to explore a mind that has almost totally escaped the civilizing influence of our society. (And why are there so many like him today?)
>
> "This mind became, as I worked, so complex and cunning that, almost automatically, the necessary plot-twists and surprises of the story erupted, often to my own astonishment, so that in the end even the plot itself became something quite distinct from all the other hostage stories I had ever encountered.
>
> ". . . It was [the young criminal] who devised the manner of holding an entire family not only captive, as in the actual incidents, but in this case mentally and emotionally hostage—so that even the civilized man, the father of the family, found within

himself the jungle urges of revenge and a passion to murder" (Ex. G, R. 382-84).

Even before Prideaux read this article, he had to know —as a result of seeing the play and reading the news clippings of the Hill incident—that The Desperate Hours was a completely fictional work. Author Hayes' article restated this obvious fact in the clearest conceivable fashion. Prideaux's problem was how to utilize LIFE's basic "gimmick"—the location photography in appellee's former home—in the face of such knowledge.

Reflecting this dilemma, Prideaux's ineffective first draft attempted to straddle the problem by minimizing the involvement of the Hill family in the article, and by emphasizing author Hayes and The Desperate Hours. The main text of Prideaux's first draft read as follows (R. 337-341):

> "TRUE CRIME INSPIRES TENSE PLAY
> "Case of a family trapped by convicts moves author to write novel, movie and now a Broadway thriller.
>
> "In 1952 a young Indianapolis author, Joseph Hayes, read a hair-raising report (above) of a suburban Philadelphia family, held prisoner in their own home by three escaped convicts. This true story sparked off Hayes to write a novel, *The Desperate Hours,* which he did later as a screen play. While it was being filmed, a New York producer persuaded Hayes to turn his novel also into a Broadway play. The movie producers agreed not to release the film for a year in order to give the play a chance to pay off. Now that *Desperate Hours* is a Broadway hit, and two more companies are rushing into production, Hayes stands to make a half million dollars on his Philadelphia horror story.
>
> "Directed by Robert Montgomery, and expertly acted, Hayes' play is a somewhat fictionalized but heart-stopping account of how one family rose to

> heroism in a crisis. LIFE photographed the play at its Philadelphia try-out, and transported some of the actors to the actual house where the family, who no longer live there, were besieged. On the next page scenes from the play are reenacted on the original site of the crime."

This draft was distributed to the Managing Editor, the Copy Editor, Prideaux's research assistant, Laura Ecker, and other persons (R. 189). Under appellant's procedure, Miss Ecker was required to place a checkmark over every single word of the LIFE article, to confirm its accuracy before publication (R. 263).* On the first page of her checking copy of Prideaux's draft, she placed question marks beside the entire first paragraph and over the word "somewhat" in Prideaux's description of The Desperate Hours as a "somewhat fictionalized account" of appellee's experience (R. 273-74, Ex. 22, R. 347).** At the trial, she explained this latter question mark as a reminder to ask Prideaux "whether [The Desperate Hours] was fictionalized or somewhat fictionalized and possibly to go over with him some similarities" between the Hill case and the play (R. 274). No such analysis was ever made (R. 272).

The second draft of the LIFE article was supervised by Joseph Kastner, an editor senior to Prideaux (R. 218-21).

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* In the course of describing the elaborate research facilities and procedures employed by appellant to avoid accidental or inadvertent mistakes in any of its articles (R. 262-71), Miss Ecker pointed out that she corrected one of Prideaux's draft captions which located the Hill home at "ten miles" from Philadelphia, to read "about ten miles," after checking this reference in the *Columbia Gazeteer* (R. 265, 271). But when it came to verifying the accuracy of the article's premise—*i.e.*, Prideaux's statement that The Desperate Hours was inspired by the Hill incident—she explained that she did this by simply asking Prideaux himself (R. 266-67).

** The reproduction of Exhibit 22 included in the Transcript of Record fails to show the question marks which appear on the original document.

Kastner eliminated the editorial hedges that Prideaux had written into the article (R. 221, Ex. 21, 342-46). Observing to Prideaux that his first draft was not "newsy enough" (R. 220-21), Kastner switched its emphasis from Hayes and The Desperate Hours to the identification of the Hill experience as the story re-enacted in the novel, play and motion picture. First he had revised the opening paragraph of Prideaux's draft, which said that Hayes was "sparked off" to write The Desperate Hours by reading an account of "a suburban Philadelphia family" held hostage by three convicts (R. 220-21, Ex. 21, R. 337). After Kastner's revisions, the opening paragraph read:

> "Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their own home outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes' novel, *The Desperate Hours,* inspired by the family's experience. Now they can see the story reenacted in Hayes' Broadway play based on the book, and next year will see it in his movie . . . ." Ex. 21, R. 346.

Then Kastner proceeded to the second paragraph and deliberately eliminated the words "somewhat fictionalized" which Prideaux had used to qualify the identification of the Hill incident with the play. Why this was done, particularly in the face of the researcher's question mark over the word "somewhat," was never explained. Kastner, who was available and attended the trial, never took the stand (R. 254). Thereafter, additional changes were made in the article to the end of making appellee's experience—rather than The Desperate Hours—its main subject. The Hill name was substituted for the vague reference to "the family" in the second paragraph (compare Ex. 20, R. 337 with Ex.

22A, R. 351); Prideaux's "running head" for the article—a statement of its basic subject matter—was changed from "The Desperate Hours" to "True Crime" (compare Ex. 20, R. 338-39 with Ex. 22A, 354); and the initial draft's statement that the Hills "no longer live" in the Whitemarsh house was eliminated (Compare Ex. 20, R. 337 with Ex. 24, R. 363). The final "Printer's Copy" was reviewed and approved by the Managing Editor and the Copy Editor (R. 192, 362-68). Approximately twelve weeks elapsed between the first discussion of the "True Crime" article in December, 1954 and its publication in February, 1955. The text of the article as it appeared in the February 28, 1955 issue of LIFE reads as follows (Ex. A, R. 15):

> "TRUE CRIME INSPIRES TENSE PLAY
> "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours'.
>
> "Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, *The Desperate Hours,* inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book, and next year will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.
>
> "The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from the play are re-enacted on the site of the crime."

In addition to a photograph showing the "STAGE SETTING" of the play, the first page of the article contains photographs of a part of a headline from the *Philadelphia Daily News* and of the exterior of appellee's former Whitemarsh home, with the following caption: "ACTUAL EVENT, as reported in newspaper, took place in isolated house about 10 miles from Philadelphia. There three convicts from Lewisburg penitentiary held family of James Hill as prisoners while they hid from manhunt. All three convicts were later captured" (R. 15). Under the heading "TRUE CRIME" and the headline "THREE CRISES AT A BACK DOOR," the second page contains photographs of scenes from the play taken at appellee's former home, which is described as the "REAL HOUSE" (R. 16). Continuing under the running head "True Crime," the third page contains three photographs of scenes from the play with captions describing actions of the "BRUTISH CONVICT," "DARING DAUGHTER," and "FEVERISH FATHER" (R. 17).

Appellant's meticulous editing procedure carried the false identification of appellee and his family with The Desperate Hours to the absolute physical limit. Not a word in the published article states or even suggests that The Desperate Hours is anything but a dramatic documentary inspired solely by the Hill incident and adhering faithfully to the facts thereof. Given complete latitude to point to any indication in the article that a single factual difference existed, Prideaux said it would be a waste of time (R. 240-41).

The truth of the whole matter was stated by the LIFE researcher when she testified that it was considered a "good gimmick" to identify the play with a single actual incident (R. 164). The Hill family was dragged back from obscurity and the events during their captivity were falsely identified with The Desperate Hours simply because the play was

trying out near their former home and they were not there to protest or otherwise interfere with this publicity stunt.

Appellant's identification of the Hill experience with The Desperate Hours—LIFE's "good gimmick"—was a matter of commercial expediency and not the dissemination of news. The Hill family, their former home, and their experience, were used like props. Words and photography concerning them were manipulated to heighten interest in what would otherwise have been a routine report on a new play, without regard to the facts and with utter indifference to the effect the false article might have on the individuals involved.*

5. *The Impact of the Publication.* The LIFE article had a devastating effect on appellee and his family. Immediately after the convicts left on September 12, 1952, appellee and his wife were made aware of the inferences that might be drawn by the public as to occurrences in the house during the 19-hour detention (R. 33). Questioning by the police focused on whether there had been violence and particularly whether Mrs. Hill or her daughters had been molested (R. 31). Appellee and his wife gave straightforward accounts of the events in the house, emphasizing in their

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* In 1952, a few days after the Whitemarsh incident, LIFE's sister publication, *Time* magazine, described appellee's experience in an article entitled "House Party," which focused on such light notes as the convicts' use of the family sewing machine to alter Mr. Hill's clothing to their own sizes, and their unusually deferential attitude toward the family, emphasizing the absence of violence or misconduct on the part of the convicts, and concluding with the note that Mr. Hill followed the fugitives' parting instructions and waited five hours "to call the police to tell them about his interesting house guests" (Ex. 2, R. 323-24). Two years later, when it served appellant's purposes in publicizing the opening of a Broadway play, LIFE transformed the Hills' experience into a "desperate ordeal" of violence where "the family rose to heroism" (Ex. A, R. 15).

statements to the authorities and the press that there had not been a single improper act on the part of the convicts, and that the family offered no resistance and behaved calmly throughout the incident (R. 31, 33). After stating the facts accurately for the benefit of the public and the press, appellee and his wife made a deliberate effort to put the incident behind them (R. 40-44, 48, 51-53). They rejected all proposals to publicize the incident for money or personal gratification (R. 42-43, 49-50). They declined to collaborate on newspaper or magazine articles, or to appear on television programs such as "The Ed Sullivan Show" (*ibid.*).

In November, 1952, about ten weeks after the incident, appellee and his family moved to Old Greenwich, Connecticut (R. 40). Reporting on this move, the Philadelphia *Evening Bulletin* for November 23, 1952, noted the comments of appellee's wife that the incident was seldom discussed and never with the children, and that the family suffered no ill effects from the experience (Ex. 5A, 325). In the Hills' new community, their incident attracted little notice or comment, soon became part of the past, and was forgotten by the public (R. 43-44).

Over the ensuing two years, appellee and his wife guarded themselves and their children from publicity concerning the Whitemarsh incident. This was not simply a matter of taste but was consciously related by the Hills to the welfare of their family (R. 50, 52-53). Rejecting an offer for a paid interview, appellee wrote: "For the best interests of our children we have felt that it was best to avoid any course of conduct that might remind them of our experience . . . ." (Ex. 8, R. 336).

Then, in February, 1955, the LIFE article nullified these efforts.

Before a national audience, in one of America's most influential and widely-read newsmagazines, appellee and his family were falsely identified with the violence, terror and lurid events depicted in the novel, play and motion picture The Desperate Hours. Appellant's vast readership, including the Hills and their own community of neighbors, acquaintances and friends, were told that if they went to see The Desperate Hours, they would witness a re-enactment of the terrifying experiences in the "desperate ordeal" of the heroic Hill family during an actual invasion of their home by depraved criminals. This categorical falsehood was the antithesis of the Hill family's experience and of everything the Hills ever said about it (R. 53). At the same time, the LIFE article created the impression that appellee and his wife had collaborated in the preparation of the LIFE article, or the book, probably for money, almost certainly for personal aggrandizement of the most tasteless order (R. 53-54). The contrast between the complete submissiveness of appellee and his family in 1952, as recorded in contemporaneous news accounts, and the fictional feats of breathtaking "heroism" for which LIFE bestowed accolades in 1955 could not have been more grotesque.

The LIFE article and its aftermath of curiosity and comment was particularly injurious to Mrs. Hill.

The article depicted her family to the public in the very light she had sought to avoid—as victims of a brutal and sordid occurrence (R. 291). Her gradual retreat from community and family life, and the onset of an acute psychotic disability in 1956, were the subject of extensive medical evidence below (R. 486-528). Giving weight to predisposing factors such as age, background, general condition of health, and the 1952 incident itself, appellee's medical experts stated their belief that the falsification of Mrs.

Hill's actual experience in the LIFE article precipitated her prolonged illness (R. 492-97, 524-25).

Although the circumstances of this case are unusual, the injury to the Hill family illustrates the consequences of recklessness and irresponsibility in the use of mass media. Victims of disasters or crimes may be deeply affected by their experiences even if they escape without physical harm. Public reminders of such events—particularly in false or distorted form—can mobilize disabling anxieties and fears. The law of privacy does not protect victims of real-life events from reminders of their experiences through legitimate news dissemination—however harmful such reminders may be. But a line is properly drawn, we submit, at false, exploitative publicity like the LIFE article.

Summary of Argument

The Constitution, by definition and implication, recognizes protected privacies and secures them from governmental intrusions. No less central to our constitutional plan is the power and responsibility of the individual states to protect their citizens from unreasonable intrusions and injury at the hands of individuals. The states have met their responsibility by developing protections of privacy through the common law and legislation.

The New York statute relates to a single, narrow area of privacy, confining its prohibition to the unauthorized use of a living person's name, portrait or picture for purposes of trade or advertising. New York Civil Rights Law §§50, 51. In common with other protected privacies, it is concerned with encroachments upon the dignity and self-respect of the individual. Its narrow focus is upon commercial exploitation of personality.

There is no conflict between the New York right of privacy and freedom of the press. Sixty years of consistent interpretation by the New York courts establishes that news is beyond the reach of the statute. The New York right of privacy protects only against the use of an individual's name or picture in an advertisement or as the primary subject of a fictionalized publication. The statute is not violated by any publication, however fictitious, malicious or commercial it may be, so long as the name or picture of a non-consenting individual is not used. The statute represents minimal regulation in favor of a significant individual interest under circumstances that represent no actual or potential restraint upon the freedom of the press.

The jury and the courts below found that the LIFE article was fundamentally false in its dramatic identification of appellee and his family with The Desperate Hours. They found, moreover, that the false identification was made in order to serve the commercial purposes of appellant. Such findings were fully supported by the evidence and establish the validity of the judgment below under all relevant constitutional standards.

I.

The New York privacy law is not an abridgment of the freedom of the press.

A. Privacy as a Fundamental Interest.

The right to privacy is fundamental to our constitutional system. Like the freedom to speak and write and print, it is vital to the growth of the individual and the enrichment of society. Protection of privacy from unreasonable intrusion by government or individuals is therefore recognized as a social interest of the highest order in our con-

stitutional plan.* Whether a particular privacy has specific protection, as in the Fourth and Fifth Amendments, or has other more general protection under the Constitution, *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), it derives meaning from the unifying concept of "the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt* v. *Baer,* 86 Sup. Ct. 669, 679 (1966) (Stewart, J., concurring).

This Court has long recognized the right of privacy. It did so when it fashioned exclusionary rules barring illegally obtained evidence in state proceedings, *Mapp* v. *Ohio,* 367 U. S. 643 (1961); when it validated local regulation of sound trucks, *Kovacs* v. *Cooper,* 336 U. S. 77 (1949); and when it sustained state restrictions on the solicitation of magazine subscriptions at private homes, *Breard* v. *Alexandria,* 341 U. S. 622 (1951). The Court also made clear in *Breard* that the right of privacy is not lost merely because of a claim that the circumstances of its protection may incidentally affect the exercise of some other right:

> "... There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable privilege, such as that of a right to work, a privilege to engage in interstate

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* "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. ...

"The conception of man embodied in our tradition and incorporated in our Constitution stands at odds to such human fungibility. And our law of privacy attempts to preserve individuality by placing sanctions upon outrageous or unreasonable violations of the conditions of its sustenance. This, then, is the social value served by the law of privacy, and it is served not only in the law of tort, but in numerous other areas of the law as well." Bloustein, *Privacy as an Aspect of Human Dignity—An Answer to Dean Prosser,* 39 N. Y. U. L. Rev. 962, 1003 (1964) (hereinafter "*Bloustein*").

> commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose." *Id.* at 625-26.

In his discussion of individual interests which are entitled to protection against even the categorical demands of the First Amendment, Professor Emerson said of the right of privacy: "Protection of this interest is essential to the maintenance of the proper balance between the life of a person as an individual and his life as a member of society. As the nature of modern society unfolds we come to appreciate more and more the feeling of Justice Brandeis that, 'The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized man.'" Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L. J. 877, 926 (1963). Emerson pointed out that the protection of privacy, like the protection of other individual interests, is relatively free of the problems that inhere in attempts to protect community or public interests, as, for example, obscenity, sedition or group libel laws. He further commented that "when we are dealing with a question of personal privacy, we are in an area, like that of belief, where the interest involved should receive a paramount measure of protection." *Id.* at 921. He concluded that "Any society sincerely interested in protecting the right of privacy is hardly likely to be at the same time hostile to the right of free expression." *Id.* at 928.*

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* Freedom of expression, as well as privacy, is threatened by unreasonable invasions into the private realm. See, *e.g.*, Ruebhausen & Brim, *Privacy and Behavioral Research,* 65 Colum. L. Rev. 1184, 1190-94 (1965); Michael, *Speculation on the Relation of the Computer to Individual Freedom and the Right to Privacy,* 33 Geo. Wash. L. Rev. 270 (1965); King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations, id.* 240; Long, *Right to Privacy: The Case against the Government,* 10 St. Louis L. J. 1 (1965); Brenton, *The Privacy*

The broad power of the states to act to safeguard individual interests in privacy is not open to question. *Breard* v. *Alexandria, supra; Kovacs* v. *Cooper, supra.* Mr. Justice Stewart's concurring opinion in *Rosenblatt* v. *Baer,* 86 Sup. Ct. 669, 679 (1966), although addressed to the law of defamation, expresses a fundamental of the law of privacy: "The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

The right of privacy which the Constitution protects from governmental intrusions, and the right of privacy which the states, through their tort law, protect from individual intrusions, are in substance the same. Each derives from the concept of an inviolate human personality; each protects areas of private life involving man's thoughts, emotions and sensations that the law says should be left alone. See *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting), and *Griswold* v. *Connecticut, supra,* at 521 (Goldberg, J., concurring).*

B. The New York Statutory Right of Privacy.

In 1903, the New York legislature enacted the predecessor statute to §§50 and 51 of the Civil Rights Law, N. Y.

Invaders (1964); Dash, Knowlton & Schwartz, *The Eavesdroppers* (1959); Gross, *The Brain Watchers* (1962); Packard, *The Naked Society* (1964); *Big Brother is Watching You,* Popular Science, March 1963; *1410 is Watching You,* Time, August 23, 1963, p. 53; Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government, before the Subcommittee of the House Committee on Government Operations, 88th Cong., 2d Sess., pt. 3 (1964).

* The similarity of language and common principle shared by Mr. Justice Brandeis' dissent in *Olmstead* and his analysis in *The Right to Privacy,* 4 Harv. L. Rev. 194 (1890), has been pointed out in *Bloustein* at 977.

Sess. Laws 1903, ch. 132 §§1-2. The statute provided a cause of action for persons whose name or picture is used, without consent, for purposes of trade or advertising. It was enacted as a direct result of the decision of the New York Court of Appeals in *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902), which declined to recognize a common law right of privacy.* It "embodied a legal recognition—limited in scope to be sure, but a clearly expressed recognition nevertheless—of the right of a person to be let alone, a right directed 'against the commercial exploitation of one's personality.'" *Lahiri* v. *Daily Mirror, Inc.*, 162 Misc. 776, 779, 295 N. Y. Supp. 382, 385 (Sup. Ct. 1937). Without essential change the statute has been in force for over sixty years. A challenge to the constitutionality of the New York statute on due process grounds was unanimously rejected by this Court. *Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502 (1911).

An invasion of privacy injures an individual by direct impact upon his personality and psychological well-being. Long before modern psychology developed clinical explanations of the human need for privacy, it was pointed out that unwanted publicity can subject individuals to "mental pain

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* The decision was basically predicated on the view of the majority that equity should not recognize rights or remedies unless they were clearly supported by common law analogues. The court suggested that the subject matter was an appropriate one for legislative action. 171 N. Y. at 545-46, 64 N. E. at 443. "The immediate result of the *Roberson* decision was a storm of public disapproval, which led one of the concurring judges to take the unprecedented step of publishing a law review article in defense of the decision." Prosser *Torts* 830 (3d ed. 1964). One of the more forceful protests was an editorial in *The New York Times* for August 23, 1902.

More than thirty states and the District of Columbia now recognize the right of privacy as part of the common law; and four states have granted statutory recognition to the right. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 386-88 (1960). The common law right of privacy is based on the principles enunciated in the Warren & Brandeis article *The Right to Privacy*, *supra*. See *Bloustein passim*.

and distress far greater than could be inflicted by mere bodily injury." Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890); see also, Pound, *Interests in Personality*, 28 Harv. L. Rev. 343, 363-64 (1915); Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 Colum. L. Rev. 1184, 1189 (1965).

The New York statute protects an individual from the use of his name or picture under circumstances that turn him into a commodity "to serve the economic needs and interests of others." *Bloustein* 988. The thrust of the statute is that every man should have the right to prevent the commercial exploitation of his personality, not because of its commercial worth, "but because it would be demeaning to human dignity to fail to enforce such a right." *Ibid.**

C. The New York Statute and Freedom of the Press.

The right of privacy, under New York law, has developed with due regard for the freedom of the press guaranteed by the federal and state constitutions. "The [New York] courts, quite properly, have been extremely liberal in protecting newspapers and magazines in order to leave unhampered the channels for the circulation of news and information which is so essential for a free press and a freedom-loving country." *Garner* v. *Triangle Publications*, 97 F. Supp. 546, 550 (S. D. N. Y. 1951).

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* *Bloustein's* view of the basic interest protected by the law of privacy is commented upon favorably by Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 Mich. L. Rev. 197, 200 (1965), which states:

> ". . . [T]here is much appeal in [*Bloustein's*] attempt to keep attention focused on privacy as an aspect of human dignity, or, indeed, as a 'spiritual interest,' rather than merely as an interest in property and reputation" in that such an approach "may help to keep attention focused on those elements of privacy which make it uniquely valued among laymen, who, after all, are the customers of the law."

Thus, the reporting of news events and the related use of names, portraits or pictures has never been considered an invasion of privacy under the New York statute. For example, in *Koussevitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, 68 N. Y. S. 2d 779 (Sup. Ct.), *aff'd mem.*, 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dept. 1947), the court stated:

> "From the outset, the courts, in interpreting the 'right of privacy' statute, took the position that it had no application to items of current news and that those who were the subject of news, whether public figures or otherwise, were not embraced in its provisions." *Id.* at 188 Misc. at 482, 68 N. Y. S. 2d at 782.*

The "reporting of news" has been broadly interpreted both as to form and subject matter. Thus, it has been extended not only to newspapers, but to newsreels, *Humiston* v. *Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. Supp. 752 (1st Dept. 1919); unauthorized biographies, *Koussevitzky, supra;* magazines, *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806 (2d Cir.), *cert. denied*, 311 U. S. 711 (1940);

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* The broad exclusion of "news" from the operation of the New York statute has proceeded from recognition that "for the purpose of trade," in the context of the statute, "does not contemplate the publication of a newspaper, magazine or book which imparts truthful news or other factual information to the public." *Sidis* v. *F-R Pub. Corp.*, *supra*, at 810. As the court observed in *Koussevitzky* v. *Allen, Towne & Heath*, *supra*, 188 Misc. at 483, 68 N. Y. S. 2d at 783:

> "All publications presumably are operated for profit and articles contained therein are used with a view to increasing circulation. Accordingly, emphasis was laid on the nature of the article, and of the use of the name or picture, and whether they were of public interest, rather than on the element of profit."

The reasoning is analogous to *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 266 (1964), where the Court found that it was not material that an advertisement was paid for (as newspapers and books are sold), but focused upon the question whether the purpose of the advertisement was commercial.

and even comic books, *Molony* v. *Boy Comics Publishers, Inc.*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1st Dept. 1950). See generally, *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 106 N. Y. S. 2d 553 (1st Dept. 1951), *aff'd*, 304 N. Y. 360, 107 N. E. 2d 485 (1952).

The subject matter which falls within the scope of "news" consists not only of reports of news events and educational articles, e.g., *Lahiri* v. *Daily Mirror*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937), but also includes "cartoons, *Believe-It-Or-Not Ripley*, gossip and social columns . . . ." *Molony, supra*, at 171, 98 N. Y. S. 2d at 123. "The deliberation of the United Nations and the chit-chat of a society editor receive equally the protection of the privilege." *Gautier, supra*, 278 App. Div. at 435, 106 N. Y. S. 2d at 557.

Similarly, the New York right of privacy does not restrict the publication of matter which is of general interest, "although no longer current." *Molony* v. *Boy Comics Publishers, Inc., supra*, at 170, 98 N. Y. S. 2d at 122; *Sidis* v. *F-R Pub. Corp., supra*, at 807; *Gautier* v. *Pro-Football, Inc., supra*, 278 App. Div. at 435, 106 N. Y. S. 2d at 577.*

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* The breadth of the privilege under the New York rule may produce harsh results. For example, in *Sidis* v. *F-R. Pub. Corp., supra*, the court had before it the biographical sketch of a child prodigy who failed to realize the promise of his early years. Although the publication was found to be a "ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life," 113 F. 2d at 807-08, Judge Clark, applying the New York statute as interpreted by the New York courts, found that it simply did not reach a publication "which imparts truthful news or other factual information." 113 F. 2d at 810. In other jurisdictions, some courts have formulated a privilege which does not extend to long-forgotten facts, *Melvin* v. *Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931), or observes a narrower definition of "interest" than the New York rule, *Barber* v. *Time, Inc.*, 159 S. W. 2d 291, 295 (Mo. 1942). See, Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. Res.

It has long been the rule in New York, however, that an individual's name or picture is commercialized when it is placed in a fictional setting. Thus, it is a violation of the New York statute to use the name or picture of a real person as the primary subject of a motion picture which is "mainly a product of the imagination," *Binns* v. *Vitagraph Co.*, 210 N. Y. 51, 56, 103 N. E. 1108, 1110 (1913), or in a book which uses "imaginary incidents, manufactured dialogue and a manipulated chronology," *Spahn* v. *Julian Messner, Inc.*, 23 App. Div. 2d 216, 219, 260 N. Y. S. 2d 451, 454 (1st Dept. 1965).* Although the final version of such publications is largely the product of the imagination, there is inevitably some connection with actual events. Hence, they are described as "fictionalized"—reflecting the process by which fact has been made into fiction. *E.g., Spahn, ibid.* It is that process which subjects the individual named or photographed to the "commercialization of his personality," *Gautier* v. *Pro-Football, Inc.*, 304 N. Y. 354, 359, 107 N. E. 2d 485, 488 (1952), and "does injury to the sense of personal dignity." *Bloustein* 988.

Koussevitzky v. *Allen, Towne & Heath, supra,* makes clear that a publication is not "fiction" or "fictionalized" merely because it contains false statements. In *Kousse-*

L. Rev. 34, 43 (1961). It is urged by appellant that such cases may present a constitutional problem by limiting the dissemination of truthful news or factual information (Brief 22), but that problem is not presented here nor, for that matter, in any of the New York cases.

Generally, the decisions of other jurisdictions parallel New York's privilege in favor of unrestricted dissemination of news and matters of general interest. See Restatement *Torts* §867, comment c (1939).

* The *Spahn* case, cited for a different proposition by appellant (Brief 23 n.), is presently on appeal to the Court of Appeals of New York and awaiting argument.

vitzky, a biography of plaintiff was held to be privileged although "interspersed with the chronological narration of the facts are stories and comments in connection with plaintiff's musical career, some avowedly apocryphal, others of doubtful reliability." 188 Misc. at 484, 68 N. Y. S. 2d at 784. The court said:

> "The right of privacy statute does not apply to an unauthorized biography of a public figure unless the biography is fictional or novelized in character. An examination of the book complained of clearly shows that it is not fictional. That it may contain untrue statements does not transform it into the class of fiction." 188 Misc. at 484, 68 N. Y. S. 2d at 783.

Thus liability does not arise from misstatements alone. The falsity must be such as to "destroy the essential accuracy" of the publication, *Molony* v. *Boy Comics Publishers, Inc., supra* at 172, 98 N. Y. S. 2d at 119, and must be combined with staging, contrivance or dramatization in order to bring it within the test of fictionalization. See *Binns* v. *Vitagraph Co., supra; Spahn* v. *Julian Messner, Inc., supra.*

Even if a publication is wholly fictional, in form and substance, the statute does not bar the incidental use of a real name or picture. *Stillman* v. *Paramount,* 1 Misc. 2d 108, 110, 147 N. Y. S. 2d 504 (Sup. Ct.), *modified on other grounds,* 2 App. Div. 2d 18, 153 N. Y. S. 2d 190 (1st Dept. 1956), *aff'd,* 5 N. Y. 2d 994, 157 N. E. 2d 728, 184 N. Y. S. 2d 856 (1958); *Damron* v. *Doubleday, Doran & Co.,* 133 Misc. 302, 231 N. Y. Supp. 444 (Sup. Ct. 1928), *aff'd,* 226 App. Div. 796, 234 N. Y. Supp. 773 (1st Dept. 1929). See also, *Wallach* v. *Bacharach,* 192 Misc. 979, 80 N. Y. S. 2d

37 (Sup. Ct.), *aff'd*, 274 App. Div. 919, 84 N. Y. S. 2d 894 (1st Dept. 1948).*

The nature of the New York test is such that liability does not arise from statements made in the heat of debate or under the pressure of an immediate deadline. Typically, as in the present case, fictionalization has no relation to the "hard news" of the daily newspaper but is a creative work produced over a period of weeks or months before publication. See, *e.g.*, *Binns, supra* (motion picture); *Spahn, supra* (book).

Thus, freedom of the press is protected by the stringent standards which a plaintiff must meet in order to support a claim under the New York Privacy Statute.

D. The Verdict of the Jury and the Decisions below.

The jury and the courts below found that the LIFE article was an invasion of appellee's privacy under the New York statute.** The trial judge's charge correctly required the jury to find, as a condition of liability, that the LIFE article involved a commercial, as opposed to news, use of appellee's name:

> "It is for you to determine whether, in publishing the article, the defendant Time, Incorporated altered or changed the true facts concerning plaintiffs' relationship to The Desperate Hours, so that the article, as published, constituted substantially fiction

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* As stated by Judge Van Voorhis in *Flores* v. *Mosler Safe Company*, 7 N. Y. 2d 276, 286, 164 N. E. 2d 853, 859, 196 N. Y. S. 2d 975, 983 (1959) (dissenting opinion): "It is one thing to introduce real people into fictional episodes. That is prohibited. It is something else to introduce actual historical events into a story, or to build the story around such events. That is not prohibited unless the real people are made to take part in imaginary events."

** The Appellate Division has the power to review the evidence and make independent findings of fact. New York Civil Practice Act §608, now New York Civil Practice Law and Rules §5501(c).

or a fictionalized version for trade purposes; that is to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine or for some other material profit.

"If you feel that the defendant Time, Incorporated did publish the article, not to disseminate news, but was using plaintiffs' names, in connection with a fictionalized episode as to plaintiffs' relationship to The Desperate Hours, your verdict must be in favor of the plaintiffs.

"Of course, an incidental mistake in the statement of a fact or facts does not render the defendant liable. The privacy law is not violated merely because of some incidental mistake of fact, or some incidental incorrect statement.

"Before the plaintiffs can be entitled to a verdict against the defendant Time, Incorporated, you must find that the statements concerning the plaintiffs in the article constituted fiction, as compared with news, or matters which were newsworthy, and that they were published for purposes of trade; that is to increase circulation or enhance the standing of the magazine with its readers, or you must find that the defendant Time, Incorporated in the preparation and publication of the article did so to advertise The Desperate Hours for the purpose of increasing the play's patronage" (R. 300-01).

Throughout its brief, appellant has euphemistically described its article as "inaccurate in some particulars," "containing factual errors," "factually inaccurate," and an "exaggerated manner of presentation" (Brief 2, 33, 36). Such descriptions do not square with the evidence of record or the findings of the jury. The LIFE article was, as the jury found, fiction.

Similarly, the New York appellate courts found that:

"... Although the play was fictionalized, *Life's* article portrayed it as a re-enactment of the Hills'

experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest" (R. 438, 439).

And,

"RABIN, J. (concurring). The use of the 'name, portrait or picture of a living person in truthfully recounting or portraying an actual current event' is not proscribed by section 51 of the Civil Rights Law (*Binns* v. *Vitagraph Co. of America,* 210 N. Y. 51, 56). The same is true with reference to a past newsworthy event if it bears some relationship to the current event portrayed. The difficulty with the position of the defendant Time is that it portrayed the previous Hill incident in a highly sensational manner and represented that the play was a true version of that event. It was not. It was fictionalized and the jury so found. Consequently it violated section 51 of the Civil Rights Law" (R. 440-41).

E. The New York Rule as a Constitutional Standard of Liability.

The review of the New York cases, and of the basis of the decision herein, shows that the New York law of privacy provides "the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments . . . ." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 264 (1964).

Appellant's argument repeatedly invokes *New York Times Co.* as an apposite authority (Brief 18, 23, 27, 29, 30, 31, 33, 36, 38, 41). The obvious distinction between *New York Times Co.* and this case is that the former involved statements concerning a public official and a public

issue, neither of which are present here.* More important, however, is the fact that under the New York privacy statute, actual malice is inherent in a finding of "fictionalization."

Fiction is a "product of the imagination." *Binns, supra,* at 56, 103 N. E. at 1110. Thus it is not created by accident or even negligence. "Fiction" is defined in Webster's Third New International Dictionary, Unabridged, 1964 Edition, as "an intentional fabrication: a convenient assumption that overlooks known facts in order to achieve an immediate goal."** "Fictionalization," *i.e.,* combining actual events with imaginary episodes to create a more interesting story, likewise connotes a deliberative process. The trial court charged the jury that, in order to find for appellee, they were required to determine that appellant

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* See also *Garrison* v. *Louisiana,* 379 U. S. 64 (1964) and *Rosenblatt* v. *Baer,* 86 Sup. Ct. 669 (1966). In *Rosenblatt,* the Court said:

> ". . . The motivating force for the decision in *New York Times* was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open *and* that [such debate] may well include vehement caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U. S., at 270. (Emphasis supplied.) There is, first a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. *Criticism of government is at the very center of the constitutionally protected area of free discussion.* Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." [Emphasis added.] 86 Sup. Ct. at 675-76.

** The same edition of Webster's lists "figment, fabrication, fable" as synonyms, and continues with the comment: "Fiction may refer to any composition wholly an invention of the imagination or noticeably more the product of the imagination than of factual reporting (When we call a piece of literature a work of *fiction* we mean no more than the characters could not be identified with any persons who have lived in the flesh, nor incidents with any particular events that have actually taken place—A. J. Toynbee)."

"altered or changed" the facts in order to create a "fiction or fictionalized version" which would "amuse, thrill, astonish or move" its readers (R. 300). The alteration of facts to create a fiction clearly involves deliberate falsehood or, at best, a reckless disregard of the facts. The jury verdict for appellee, pursuant to that charge, was *ipso facto* a finding of actual malice.*

Findings of actual malice are implicit in the opinion below:

> "Although the play was fictionalized, *Life's* article portrayed it as a re-enactment of the Hills' experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well" (R. 438).

The statement by the court that appellant falsely portrayed appellee's experience for the specific purpose of advertising the play and increasing circulation amounts to a finding that it was not an accidental or negligent falsehood.**

The central fact which emerges from our detailed discussion of the preparation of the LIFE article (*supra*, at

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* The opening and closing of appellee's counsel presented the case as one of deliberate concoction; no suggestion was made that liability could be predicated on mere inadvertence or negligence (R. 461-73, 548-65). Moreover, the jury exercised its discretion in awarding punitive damages to appellee and his wife pursuant to a charge which presented the question whether the LIFE article's falsity was the result of "reckless or wanton" conduct on appellant's part (R. 566).

** This finding established that the jury's award of punitive damages was proper. Thus, the Appellate Division ordered a new trial on the ground that the damages (punitive and compensatory) were excessive, but did not indicate the award of punitive damages was unwarranted. The reassessment of damages by a trial judge, without a jury, resulted in an award of compensatory damages only; under § 51, an award of punitive damages is discretionary even where actual malice is shown.

pp. 10-17), is that appellant's editor, Tom Prideaux, *knew* that The Desperate Hours was not a re-enactment of the Hills' experience; and accordingly, Prideaux *knew* the article was false in so stating. There is no credible interpretation of the record which can refute that fact.

Appellant concedes that it was "negligent" because it had in its files a newspaper article in which the author Hayes said The Desperate Hours was completely fictionalized; and in this connection appellant cites *New York Times Co.* v. *Sullivan, supra,* at 287-88 (Brief 33). The concession is misleading and the citation of *New York Times Co.* is inappropriate. In contrast with the article in *New York Times Co.,* Hayes' article did not lie unread in appellant's general files; it was in the story file for the LIFE article on The Desperate Hours and was read by LIFE editor Prideaux before he started writing his first draft (R. 198).* We submit that no one who read Hayes' article could have entertained an honest belief that The Desperate

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* Even as to material within its general files, *e.g.*, the 1952 *Time* article on the Hill incident, "House Party", the appellant's position is not comparable to the publisher's in *New York Times Co.* As Professor Pedrick, in his discussion of the advertisement in *New York Times Co.,* has pointed out:

> "As to material originated by the press itself, however, the position should be quite different. What the press published by way of its own news story or by way of editorial should be subjected to the standard of responsibility appropriate to any originator. One who publishes on his own authority a statement as fact without reasonable grounds for knowing whether it is true or false is surely chargeable with a reckless indifference as to whether it is true. *The first amendment is concerned with protecting the free flow of information—not slipshod reportorial work.* If a paper publishes as fact on its own authority a proposition disprovable by information in its own files we will not await the further development of electronic memory aids to charge the publisher with a reckless disregard of the truth." [Emphasis added.] Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Cornell L. Q. 581, 599-600 (1964).

Hours was the story of the Hills' experience. Moreover, Prideaux's knowledge was not limited to the Hayes article; by his own account, he went to the play and read newspaper clippings of the original incident (R. 197-202). We submit that no one who witnessed the sordid and violent scenes of The Desperate Hours could have entertained an honest belief that such scenes re-enacted the events described by the clippings.

Even upon the hypothesis that the LIFE article—with its staging, meetings with the author, twelve weeks of preparation, and precise manipulation of words—somehow arrived at its false premise by a fantastic accident, why, we ask, should it be immune? What overriding interest does the Constitution have in protecting false words, prepared in a commercial setting, when they cause serious injury to private persons who have done everything in their power to avoid exploitation and publicity?

The evidence and findings below establish the following with irrefutable clarity: The use of appellee's name was not incidental but was primary to the article; the statements concerning appellee were not mere inaccuracies but introduced him into imaginary episodes; appellant's article was a staged and sensationally dramatized presentation; the invasion of appellee's privacy was substantial and his injury was serious. To hold that the LIFE article is constitutionally immune from redress under such circumstances would destroy a vital aspect of the right of privacy thoughtfully developed by the legislature and courts of New York over a sixty-year period. There is no constitutional demand or justification for such a holding.

II.

The New York privacy statute is a valid regulatory measure.

The New York right of privacy statute does not proscribe the expression of ideas or the communication of information. It represents an absolute minimum of regulatory action by the state, restricting only the use of the "name, portrait or picture" of a non-consenting living person.* Even that narrow restriction is imposed only when the use is for commercial purposes; it is wholly inapplicable to the dissemination of news or other factual information of general interest.

Unlike cases involving statutes attempting to control the content of speech that a legislature deems undesirable—subversive speech, *e.g., Dennis* v. *United States,* 341 U. S. 494 (1951); or obscenity, *e.g., Roth* v. *United States,* 354 U. S. 476 (1957); or group libel, *e.g., Beauharnais* v. *Illinois,* 343 U. S. 250 (1952)—the New York privacy statute is wholly neutral in the realm of ideas; it makes no more difficult or hazardous the decision to take one side of any issue, public or private, than to take the other. *Cf.,* Frantz, *The First Amendment in the Balance,* 71 Yale L. J. 1424, 1449 n. 105 (1962). Moreover, the statute is not susceptible of application to effect suppression of selected points of view. For example, it is readily distinguishable from statutes under which public officials can regulate the content of speech by the exercise of discretion in granting or withholding licenses. Compare, *e.g., Staub* v. *Baxley,* 355 U. S. 313 (1958). Indeed, the statute does not preclude the expression of any idea under any circumstances.**

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* Even the identification of the private individual by the subject matter, by general description, or by colloquium—as in the law of libel—is not actionable under the statute. *Toscani* v. *Hersey,* 271 App. Div. 445, 65 N. Y. S. 2d 814 (1st Dept. 1946).

** The statute is not violated by a publication, however false and commercial, unless the name or picture of the non-consenting individual is used.

We submit that the statute is a minimal regulation to protect a right which appellant itself describes as "fundamental" and "entitled to a momentum of constitutional respect" (Brief 39). See *Schneider* v. *State (Irvington)*, 308 U. S. 147, 161 (1939).

III.

The First Amendment does not protect false and injurious statements made for commercial purposes.

Appellant urges that its "utterance has considerably more redeeming social value than defamation, obscenity, intentional falsehood or advertising," and thus is entitled to protection under the First Amendment (Brief 25). In this connection appellant cites *Roth* v. *United States*, 354 U. S. 476 (1957) and *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942) (Brief 39). Such an argument misconceives the law and offends a rational concept of "social value."

First. Authorities such as *Roth* v. *United States, supra*, are not apposite. The present case, like libel, involves a direct, immediate injury to an individual and therefore rests on fundamentally different considerations from those involved in the obscenity cases. See Emerson, *op. cit. supra*, at 920-21, 927.

Second. The Court made clear in *Chaplinsky* v. *New Hampshire, supra*, that the protection of the First Amendment does not reach injurious utterances which are "no essential part of any exposition of ideas." *Id.* at 572. The signal characteristic of appellant's "utterance" is its pervasive falsity. Whatever may be the contribution of false statement to matters of public debate (see *New York Times Co.* v. *Sullivan, supra*, at 279, note 19), it serves no function

in the discussion of a private person "unwittingly catapulted into the news by events over which he has no control" (Brief 31). This is particularly so after public interest in his experience subsides. Falsity in the latter context—whether intentional or inadvertent—can neither enlighten nor inform. *Cf. Donaldson* v. *Read Magazine, Inc.*, 333 U. S. 178 (1948); *E. F. Drew & Co.* v. *F. T. C.*, 235 F. 2d 735 (2d Cir.), *cert. denied*, 352 U. S. 969 (1956).

Describing its utterance as "entirely laudatory," and contrasting it with libel, appellant suggests that such words are less objectionable than a libel and hence entitled to greater constitutional protection (Brief 25, 26, 39). The distinction is without merit:

> "In the first place, a laudatory treatment may make one appear more ridiculous than a factual one, at least to those who know enough of the truth. In the second place, one may have strong feelings about not being portrayed in any exaggerated light. Lastly, there may be serious difficulties in determining what is laudatory." *Spahn, supra* at 221, 260 N. Y. S. 2d at 456.

The foregoing observations are well illustrated by the present case. The Hills were credited by LIFE with fictitious "heroism" arising out of imaginary episodes of violence. The inevitable effect was to make the Hills appear ridiculous, or worse, in the eyes of those who had been told the true story.* Appellant's contention that associating appellee with false claims of heroism mitigates the harm of its publication is an affront to common sense. At the same time, the very identification of the Hills with the sordid

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* Appellee testified: "I felt like they were going to believe that we were liars or phonies because we had told everyone at the start that in the Whitemarsh incident nothing like that happened to us" (R. 53).

events of The Desperate Hours was anything but "laudatory."

Finally, appellant is wrong in assuming that its publication warrants classification as journalism rather than "advertising." The evidence established that the LIFE article was not a normal review by a theatre critic but represented highly-prized publicity for The Desperate Hours; that it was prepared in collaboration with the producers of The Desperate Hours; and that part of the cost of preparing the article was paid by The Desperate Hours Company (R. 103, 108-118). Ascribing particular weight to the device of staging violent scenes from The Desperate Hours in appellee's former home ("It must be remembered that this was the house where the real Hill incident occurred" (R. 437)), the state courts held that

> (a) the false identification of appellee's experience with The Desperate Hours was primary to the LIFE article (R. 438);
>
> (b) the portrayal of appellee's experience in a "sensational and fictional manner" was solely for commercial purposes (R. 442);
>
> (c) it was "an inescapable conclusion" that the falsification of appellee's experience "was done to advertise and attract further attention to the play,* and to increase present and future magazine circulation as well" (R. 438); and

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* The jury found for the "theatrical defendants," *i.e.*, the author and producers of The Desperate Hours. However, the basic contention of the theatrical defendants throughout the trial and summarized in the court's charge was that while they collaborated in the preliminary stages of the LIFE article, they had neither knowledge of, nor control over, the text of the article and were therefore "in no way responsible for the contents of the article or for the mention of the [Hills] therein" (R. 296). Thus, the verdict for said defendants was not inconsistent with the finding of the appellate courts that the LIFE article constituted an advertising use of appellee's name.

(d) in its use of appellee's experience, the LIFE article did not represent "even an effort to supply newsworthy information in which the public had, or might have a proper interest" (R. 439).

Assuming, arguendo, that appellant's identification of appellee's incident with The Desperate Hours was not an intentional falsehood but merely negligent, the elements of commercial purpose—*e.g.*, the promotional function of the LIFE article, the furnishing of assistance and defrayal of expenses by the producers of The Desperate Hours, elaborate staging—establish that appellant's publication was a commercial concoction which is not entitled to constitutional immunity. *Cf. Valentine* v. *Chrestensen,* 316 U. S. 52 (1942).

IV.

Appellant's claim that the New York privacy statute is void in part on its face is without merit.

1. *The question is not raised herein.* In the courts below, and in its statement of the Question Presented to this Court (Brief 2, 3), appellant attacked the constitutionality of the New York statute only as it was construed to permit the award of damages under the specific circumstances of the present case. Now, at pages 34-36 of its brief, appellant belatedly urges that §50 of the Civil Rights law is unconstitutional on its face.*

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* If the validity of the statute had been challenged initially, appellee could have litigated that issue without the expense of a trial or pleaded a common law cause of action alternatively. The New York courts have said that the right of privacy in New York is purely statutory, citing *Roberson* v. *Rochester Folding Box, supra.* See, *e.g., Gautier* v. *Pro-Football, Inc., supra.* If the validity of the statute had been questioned, however, the existence of a common-law right might have been re-examined in the light of the development of the right of privacy in other jurisdictions subsequent to the decision in *Roberson.*

The entire argument is based upon a patently false premise, *to wit,* that the New York Court of Appeals held valid the criminal sanction of §50. The Court of Appeals did not so hold, nor did it express any opinion as to the validity of the criminal sanction. By amendment of its remittitur, it found the constitutionality of §§50 and 51 of the New York Civil Rights Law presented and necessarily passed upon only "as applied to defendant" and the sections were held valid only "as so applied" (R. 458). §50 was mentioned in the amended remittitur because its description of the necessary consent is incorporated by reference in §51. The criminal sanction of §50 has in no way been applied, nor was it in any way involved in the present case. Accordingly, the court below cannot be said to have held it valid in the face of appellant's constitutional challenge.

The constitutionality of §50 was not implicitly upheld by the Court of Appeals affirmance of the opinions below. Appellant wrongly asserts that

> "The majority and concurring opinions of the Appellate Division have stated, in effect, that appellant's conduct was such as to subject it to criminal liability under Section 50 and that an indictment based on the facts of this case would be legally sufficient" (Brief 35-36).

The majority opinion expressly states that the action is based on a "violation . . . under Section 51" (R. 436), and the concurring opinion found that appellant had "violated Section 51" (R. 441). Neither opinion mentions either §50 or its criminal sanction.

Appellant acknowledges that the present case involves merely an award of damages under §51. Any question as to the validity of the criminal sanction in §50 is not only

absent here,* but it could not be present in any possible application of §51. Hence it is not before this Court. *Cf., NAACP* v. *Button,* 371 U. S. 415, 432 (1963). The remedies of §§50 and 51 are independent and each may be judged on its own merits.

Appellant's fear of criminal prosecutions cannot be genuine (Brief 36). The sixty-year history of the statute records only two Magistrates' Court prosecutions, both initiated by the complaint of private persons, both dismissed. Hofstadter & Horowitz, *The Right of Privacy* 287 (1964). Despite the criminal sanction of §50, the statute is one "depending primarily upon civil sanctions for enforcement." See *Winters* v. *New York,* 333 U. S. 507, 515 (1947).

2. *The Statute is not too broad.* There is no basis for appellant's contention that the statute is too "broad" to support the imposition of a criminal sanction. A fortiori, it is clearly not too broad for a civil sanction. Appellant suggests that the criminal sanction is aimed at "free discussion of public issues" and some "ordinary news" (Brief 36). The New York courts, however, have consistently interpreted the statute as inapplicable to the dissemination of news or factual information of general interest. Thus, the operation of the statute cannot reach an area of possible conflict with the Constitution. See discussion, *supra,* at pp. 26-31. This interpretation, reflecting the legislative intent to bar commercial exploitation, has been consistently applied and fixes the meaning of the statute "as definitely as if it had been so amended by the legislature." *Winters* v. *New York, supra,* at 514. See also, Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 107 U. Pa. L. Rev. 67, 73 (1960).

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* §51 independently defines the prohibited acts, *i.e.,* the use, without consent, of a person's name, portrait or picture within New York for advertising or trade purposes.

V.

Appellant's test of liability is contrary to basic constitutional principles.

The test of liability proposed by appellant for this case does not resemble any constitutional test in any area of First Amendment law. Appellant argues that the *only* basis of liability should be proof that a "non-public figure was connected to [a] news item by a publisher who knew that the connection was baseless or who acted in reckless disregard of that fact" (Brief 40). Similarly, appellant argues that "fictionalization is irrelevant except where it is complete, that is, where the connection is totally false" (*ibid.*). It would follow that if some "connection" does exist between a non-public figure and a news item, the publisher can misstate the connection with impunity, at least insofar as the law of privacy is concerned. Short of defamation, the concoction of fictitious and deliberate falsehoods would be limited only by the bounds of the publisher's imagination.

Stated in relation to the present case, appellant's rule would have permitted it to select the house of any hostage incident that author Hayes knew about when he wrote The Desperate Hours and, with constitutional immunity, deliberately fabricate a photo article stating that the violence and heroics of The Desperate Hours re-enacted the experiences of *that* particular family (see note at p. 7, *supra*). The idea of granting such license to publishers to use private persons as commercial props is not only contrary to fundamental notions of decency, it is opposed to governing constitutional principle. As this Court stated in *Garrison* v. *Louisana*, 379 U. S. 64, 75 (1965):

> "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposi-

> tion of ideas, and are of such slight value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality .... Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

We submit that neither the First Amendment nor any other important constitutional interest requires this court to supplant a state rule which, as here, protects private persons from deliberately false, injurious words published for purposes of trade or advertising.

CONCLUSION.

For the foregoing reasons, this appeal should be dismissed, or in the alternative, the judgment of the Court of Appeals of New York should be affirmed.

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APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK CIVIL RIGHTS LAW

§ 50. *Right of privacy*

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. *Action for injunction and for damages*

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But

nothing contained in this act shall be construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.